ORIGINAL

No. 92-8894

In The

SUPREME COURT OF THE UNITED STATES

October Term 1993

CLARENCE VICTOR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

Petition For Writ Of Certiorari To The Nebraska Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The facts of the killing which prompted Victor's conviction and sentence of death, as well as the issues raised at trial and assigned and argued on the direct appeal of this matter are found in ***State v. Victor***, 235 Neb. 770, 457 N.W.2d 431 (1990), ***cert.den.*** ___ U.S. ___, 111 S.Ct. 1091.

The state trial court, in considering Victor's state post conviction motion, determined after a review of the petition and the records of his previous trial, conviction, sentence and appeal that it was not necessary under state post conviction statutes to appoint counsel to represent Victor at that stage of the proceeding. Further, the state trial court concluded that each of the issues Victor sought to raise in his post conviction proceeding had either been raised and addressed upon the direct appeal of his conviction and sentence, or the allegations of error contained in his petition for post conviction relief were "unsupported by any allegations of specific facts" adequate to necessitate an evidentiary hearing. Petitioner's Appendix C, p. 1-3.

ARGUMENT

I.

APPOINTMENT OF COUNSEL

Victor first complains that the federal constitution mandates that he be afforded legal counsel for the purposes of preparing and arguing his state post conviction motion. (Petitioner's Brief, Reason I.)

A.

There exists no federal constitutional right to counsel in state post conviction proceedings.

Murray v. Giarratano, 592 U.S. 1 (1989) was a death penalty case involving the question of whether, under the federal constitution, it was necessary for the state to appoint counsel for a state prisoner in a state post conviction proceeding. In that case this Court held that neither the 8th Amendment nor the Due Process Clause require the appointment of counsel for indigent death sentenced inmates seeking state post conviction relief. See also ***Pennsylvania v. Finley***, 481 U.S. 551 (1987).

B.

Under Nebraska law a post conviction proceeding is a form of relief wholly independent from the prisoner's state court criminal trial or his first appeal of the resulting criminal conviction.

The federal constitution does not demand that the states afford convicted criminals further avenues for seeking relief from a criminal conviction and sentence which have been obtained appropriately at a state court criminal trial and reviewed and affirmed by a state appellate court. Therefore, the nature of any such relief which is afforded by a state is solely a question of state law.

Under Nebraska law a state post conviction proceeding initiated pursuant to Neb. Rev. Stat. § 20-3001 *et seq.* (1989) is a civil remedy, **not** a direct extension of the state criminal trial or appellate process. (***State v. Luna***, 230 Neb. 966, 434 N.W.2d 526 (1989), an individual seeking post conviction relief has the burden of establishing a basis for such relief. ***State v. Pratt***, 224 Neb. 507, 398 N.W.2d 721 (1987), a motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated). No state statute, rule or practice guarantees an individual seeking state post conviction relief the right to appointment of counsel at any stage of that proceeding absent specific findings by the state trial court.

Therefore, the only question remaining is whether the federal constitution **requires** that a state which has chosen to create a post conviction remedy also afford such an applicant, if indigent, counsel to assist in that process. As noted above, we believe that question has been already answered by this Court in ***Murray v. Giarratano***.

Victor relies upon the theory that since his state post conviction proceeding is his first opportunity to raise his ineffective assistance of counsel claim, that his state post conviction proceeding, at least on that issue, undergoes a constitutional metamorphosis, and becomes not the civil remedy envisioned by the Nebraska legislature, but his first "appeal of right". Victor is wrong on the facts and the law in reaching this conclusion.

First, there is nothing in Nebraska law or practice which prevents a claim of ineffective assistance of counsel being raised as a part of the criminal defendant's criminal trial and direct appeal. Second, the "one and only appeal" discussed in ***Douglas v. California***, 372 U.S. 353 (1963), was specifically a convicted criminal's **direct appeal** of his or her conviction. Nothing in ***Coleman v. Thompson***, 501 U.S. ___, 115 L.Ed.2d 640 (1991) purports to alter this Court's previous articulation of this proposition.

It requires a significant leap--one far beyond the bounds of the federal constitution as we currently understand it--to conclude that an indigent prisoner's right to counsel in the direct appeal of his criminal conviction is in any respect analogous to whether

a similar right must be afforded in a separate and distinct state court civil proceeding.

II.

INEFFECTIVE ASSISTANCE OF COUNSEL

Frankly, we are not certain that we can articulate what Victor's ineffective assistance of counsel argument is. *See* Petitioner's Brief, Reason II. The text appears to be simply a copy of an argument made to the Nebraska Supreme Court in the proceeding from which Victor seeks the writ of certiorari.

To the extent that we understand it, Victor appears to claim that he received ineffective assistance of counsel **not** during his criminal trial and direct appeal, but in the preparation of his petition for state post conviction relief about which he had just complained about having to proceed **without** counsel. See Brief of Petitioner, p. 30-31.

A.

Victor had no counsel

The first problem arises with regard to Victor's complaint regarding ineffective assistance of counsel based upon an allegation of a conflict of interest.

Victor filed his post conviction motion **pro se**. (Petitioner's Brief, p. 8-9) Ironically, Victor argued earlier that it was his **lack** of counsel which renders the state post conviction proceeding constitutionally deficient. *See* Petitioner's Brief, Reason I. Now he would have it the other way around. Now he argues that the counsel he **did** have representing his interests before the state

trial court rendered him ineffective assistance under the federal constitution due to a conflict of interest. It is either amazing or amusing that Victor should argue his plight with respect to counsel in the alternative. Either he had counsel or he did not.

No appearance was entered on Victor's behalf in the state trial court. The record indicates and Victor admits, when it suits him, that he had no counsel before the state trial court. "It should be mentioned that at all times during these [state post conviction] proceedings *** that [Victor] was Pro Se." Petitioner's Brief, p. 9. If, then, he had no counsel before the state trial court, then the counsel he did not have certainly could not have rendered him ineffective assistance due to a conflict of interest.

Victor ignores this awkwardness in the record and proceeds to buttress his latest version of his plight before the state trial court, not by reference to the record, but by pure speculation. Petitioner's Brief, p. 29. Such speculation is not sufficient to carry his cause before this Court even if the error had been properly raised, assigned and argued before the Nebraska Supreme Court.

B.

Waiver

In Victor's post conviction motion before the state trial court he listed seven specific complaints. Yet in his brief before the Nebraska Supreme Court Victor argued two new issues: (1) that his state post conviction counsel before the district court

suffered from a conflict of interest (Brief of Appellant, p. 28-31); and (2) that his trial counsel failed to properly support or pursue the motion for change of venue which was filed and denied at trial. Neither of these issues are among the seven issues presented to the state trial court for decision by Victor's post conviction motion.

Thus, the only two issues argued by Victor to the Nebraska Supreme Court with respect to ineffective assistance of counsel were neither raised before the state trial court nor assigned as error on appeal. As such, the only two propositions argued in support of Victor's allegations of ineffective assistance were not presented to the state trial court for decision and were thus not properly presented to the Nebraska Supreme Court, while the allegations of error which were raised before and resolved by the state trial court were apparently abandoned on appeal. This constitutes a waiver of each issue.

The Nebraska Supreme Court has long held it will only consider errors which are ***assigned and argued*** by the Appellant. ***State v. Thomas***, 236 Neb. 568, 462 N.W.2d 618 (1990). Furthermore, allegations of error articulated for the first time in the argument of an appellant's brief are not properly presented for decision.

III.

THE REASONABLE DOUBT INSTRUCTION

Victor correctly points out that the Nebraska Supreme Court has reviewed Nebraska's most common reasonable doubt instruction in view of this Court's opinion in ***Cage v. Louisiana***, 498 U.S. ___,

111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and found that the Nebraska instruction did not suffer the same infirmity identified by this Court in ***Cage***. ***See State v. Morley***, 239 Neb. 141, 474 N.W.2d 660 (1991). Victor also correctly points out that the reasonable doubt instruction about which he complains and the instruction approved by the Nebraska Supreme Court in ***Morley*** are identical.

A.

At the outset we note that any interpretation of a reasonable doubt instruction which **enhances** the concept of reasonable doubt in the mind of a reasonable juror works to the **benefit** of the criminal defendant. The more difficult it becomes to achieve a reasonable doubt, the more difficult it is for the state to establish the defendant's guilt of the crime charged **beyond** a reasonable doubt.

To the extent that the Nebraska reasonable doubt instruction might be argued to move the concept of reasonable doubt from that amorphous point required by the Due Process Clause, the Nebraska instruction makes it more difficult for the state to convict. Victor may only legitimately complain if the instruction made it easier for the state to convict him. That did not occur here.

B.

In applying ***Cage*** to Nebraska's reasonable doubt instruction, the Nebraska Supreme Court stated:

> It is true that both the ***Cage*** instruction and the [Nebraska] instruction tell the jury that, in effect, a reasonable doubt is an actual and substantial one. But while the ***Cage*** instruction also equates a reasonable doubt with a grave one,

the [Nebraska] instruction does not. The [Nebraska] instruction merely advises that a reasonable doubt is such as would cause a person "to pause and hesitate" when considering one of the "graver and more important transactions of life." Moreover, while a reasonable reading of the *Cage* instruction leads to the conclusion that an accused is to be convicted unless such doubt raises to the level of a moral certainty, the [Nebraska] instruction permits conviction **only** if the **lack** of such doubt is established to a moral certainty. In other words, under the *Cage* instruction a juror is to vote for conviction unless convicted to a moral certainty that there **exists** a reasonable doubt, whereas under the [Nebraska] instruction a juror is to vote for **acquittal** unless convinced to a moral certainty that no reasonable doubt exists. These are two very different instructions; indeed, one contradicts the other.

Morley, 239 Neb. at 155, 474 N.W.2d at 670 (emp.added).

If anything, the instruction under which Victor was convicted made it more difficult than required by the Due Process Clause of the federal constitution to convict him of his crime, but in a case where the defendant's guilt has been established beyond question, much less beyond a reasonable doubt, neither the federal constitution nor our generic sense of "justice" can be offended by this verdict.

CONCLUSION

The reasons forwarded by Victor to prompt the issuance of the writ prayed for simply do not merit the relief prayed for. The petition should be denied.

Respectfully submitted,

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June 23, 1993

PROOF OF SERVICE

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

I, J. K. Brown, being first duly sworn, depose and state that two copies of the brief in the above entitled case were served upon the Petitioner by depositing said copies in the United States Mail, certified and return receipt postage prepaid, addressed to Petitioner's counsel of record, Mark A. Weber and J. Joseph McQuillan, 11301 Davenport Street, Omaha, NE 68154, on this 23rd day of June, 1993.

J. K. Brown
Affiant

Subscribed in my presence and sworn to before me this 23rd day of June, 1993.

GENERAL NOTARY-State of Nebraska
BEVERLY A. EPKE
My Comm. Exp. March 24, 1994

Beverly H. Epke
Notary Public

45-209-2

GENERAL NOTARY-State of Nebraska
BEVERLY A. EPKE
My Comm. Exp. March 24, 1994